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Supreme Court of the United States

REBECCA FRIEDRICHS, *et al.*,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF DANIEL DISALVO IN SUPPORT OF PETITIONERS

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Abood v. Detroit Bd. of Ed.,
431 U.S. 209 (1977) 7

Cal. Brewers Ass'n v. Bryant,
444 U.S. 598 (1980) 4

Jones & Laughlin Steel Corp.,
66 N.L.R.B. 386 (1946) 6

Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB,
501 U.S. 190 (1991) 10

NLRB v. Ins. Agents' Int'l Union,
361 U.S. 477 (1960) 4, 6

Vergara v. California,
No. BC 484642, slip op. (Cal. Super. Ct. Aug. 27, 2014) 20

Statues & Other Authorities

29 U.S.C. § 158 4

N.Y. Civ. Serv. Law § 209-a 10

H.R. Rep. No. 74-1147 (1935) 6

Cited Authorities

Page

Caroline M. Hoxby & Andrew Leigh, *Pulled Away or Pushed Out? Explaining the Decline of Teacher Aptitude in the United States*, 94 Am. Econ. Rev. 236 (May 2004) 20

Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, 111 Q.J. Econ. 671 (1996).....19

Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Lab. & Emp. L. 441 (2003).....5

Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156 (1974).....7

Dan Walters, *Democrats Strengthen Unions Noose*, Orange County Reg., July 10, 2009.....8

Daniel DiSalvo, Government Against Itself (2015) ..... *passim*

Daniel Weisberg, *et. al.*, *The Widget Effect* (2009) 17

Editorial, *A Tale of Two Counties*, Washington Post, (May 30, 2010).....18, 19

Cited Authorities

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Franklin D. Roosevelt, *The President Indorses Resolution of Federation of Federal Employees Against Strikes in Federal Service* (Aug. 16, 1937), in The Public Papers and Addresses of Franklin D. Roosevelt (Samuel I. Rosenman ed., 1941) 4

Frederick M. Hess & Coby Loup, *The Leadership Limbo: Teacher Labor Agreements in America's Fifty Largest School Districts* (Thomas B. Fordham Institute 2008) 11-12

Jessica Levin, *et. al.*, *Unintended Consequences: The Case for Reforming Staffing Rules in Urban Teachers Union Contracts*, The New Teacher Project (2005) 20

John O. McGinnis & Max Schanzenbach, *The Case Against Public Sector Unions*, Hoover Institution Policy Review, (Aug. & Sept. 2010)..... 23

Katharine Strunk & Jason Grissom, *Do Strong Unions Shape District Policies?*, 32 Educational Evaluation and Policy Analysis (2010)... 12

Lee C. Shaw & R. Theodore Clarke, Jr., *The Practical Differences Between Private & Public Sector Collective Bargaining*, 19 UCLA L. Rev. 867 (1972) 5

Cited Authorities

Page

Matthew Futterman & James M. O'Neill, *Despite Setbacks, Teachers Union Remains a Political Force*, Philly.com (Nov. 14, 1996) 8

Myron Lieberman, *The Educational Morass: Overcoming the Stalemate in American Education* (2007) 21

PAC Power! Everything You Need to Know to Create a Politically Active Local Association!, Michigan Education Association Political Action Committee, Aug. 2015 10

Richard J. Riordan & Tim Rutten, *A Plan to Avert the Pension Crisis*, N.Y. Times, Aug. 4, 2013.....23

Robert Novy-Marx & Joshua Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 The Journal of Finance 1211 (2011) 23

Robert L. Walker, The Teacher and Collective Bargaining 29 (1975) 11

Schools and Staffing Survey, compiled by the Institute of Education Sciences, U.S. Department of Education (2012) 13

Scott Reeder, *School Boards Lose Power to Fire Poor Teachers*, The Hidden Costs of Tenure (2005).....14

Cited Authorities

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Scott Reeder, *Tenure Frustrates Drive for Teacher Accountability*, The Hidden Costs of Tenure (2005) 16

Steve Farkas, *et. al.*, *Rolling Up Their Sleeves: Superintendents and Principals Talk about What's Needed to Fix Public Schools*, Public Agenda (2003) 14, 15

Steve Farkas, *et. al.*, *Stand by Me*, Public Agenda (2003) 17

Steven Malanga, *The Compensation Monster Devouring Cities*, City Journal (Summer 2011) 21

Terry M. Moe, *Collective Bargaining and the Performance of the Public Schools*, 53 Am. J. Pol. Sci. (2009) 20

Terry M. Moe, Special Interest: Teachers Unions and America's Public Schools (2011) ..... *passim*

Trevor Burrus, *Harris v. Quinn and the Extraordinary Privilege of Compulsory Unionization*, 70 N.Y.U. Ann. Surv. Am. L. 283 (2015) 5

Troy Senik, *The Worst Union in America*, City J., Spring 2012 8

INTEREST OF AMICUS CURIAE

Amicus curiae Daniel DiSalvo is an associate professor of political science at The City College of New York-CUNY and a senior fellow at the Manhattan Institute. Prof. DiSalvo—an objecting public-sector union member himself—has written extensively on the subject of public employee unions, including, most recently, Government Against Itself (Oxford Univ. Press 2015). Professor DiSalvo previously participated in this case. *See* Brief of Constitutional Law Professors, Prof. Daniel DiSalvo, the Judicial Education Project, and Center for Constitutional Jurisprudence as *Amici Curiae* in Support of Petitioners, *Friedrichs v. California Teachers Association*, No. 14-915 (filed Feb. 27, 2015). *Amicus curiae*'s interest is in seeing the proper application of this Court's First Amendment precedent in the public-union setting.[1]

INTRODUCTION & SUMMARY OF ARGUMENT

Public-employee unions are unlike private-sector unions in that they are not only unions but also "unique interest groups." Daniel DiSalvo, Government Against Itself 28 (2015). As Petitioners explain, they actively participate in the political process and regularly engage in political speech. *See generally* Brief for Petitioners ("Pet. Br.") Indeed, through their lobbying, campaign activity, and collective bargaining, they have an outsized influence on public policy.

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

Public unions' unique ability to effect policymaking stems from certain advantages they have over all other interest groups: they have "access to policy makers through the collective bargaining process," they can easily "mobilize" their membership for "electoral participation," and they "enjoy a steady, reliable revenue stream" through the collection of union dues that "must be paid by all members in a bargaining unit regardless of whether they join the union or not." DiSalvo, *supra*, at 29. Known in the vernacular as "agency fees," because they are the monies nonmembers must pay for the union acting as their agent in collective bargaining, these mandatory dues provide a strong incentive for public employees to join the union. This is because unions often set the agency fee as nearly identical to union dues. Consequently, in states that permit agency fees, union membership is higher.

Along with agency fees for nonmembers, higher union membership means millions more dollars in public-union coffers. The unions use many of those dollars to fund campaigns and get-out-the-vote efforts in support of their favored politicians. *Id.* at 28. Those politicians then sit on the other side of the bargaining table from the unions, acting as "management" and agreeing to "generous contracts for public workers." *Id.* at 28-29. Workers then pay more into union coffers, and the whole cycle starts again, as public unions use their power and influence to obtain more power and influence. *Id.* at 29. This is quite literally the public-union playbook.

From the public unions' point of view, this is a successful formula for obtaining favorable employment terms through the collective-bargaining process. Without a genuine adversary on the other side of the table, public

unions can negotiate higher salaries and protectionist rules that insulate them from termination and from any meaningful performance review.

From the public's point of view, this distorts the democratic process. *Id.* at 28. It is effectively the government negotiating with itself. With their membership and revenues bolstered by agency shop provisions, public-union political power increases the costs of government while diminishing the quality of services provided by it.

This is certainly the dynamic in California, one of the twenty-five States that permits these "agency shop" arrangements. Respondent teachers' unions collect "hundreds of millions of dollars" from California teachers (union members or not) each year. Pet. Br. at 1. Underwritten by agency shop provisions, teachers' unions outspend every other interest group in order to elect lawmakers who will serve their interests. Bargaining without true adversaries, California teachers' unions obtain deals that include lock-step salary increases disconnected from performance, seniority protections, and procedural rules that prevent substantive reviews of teachers and make it impossible to terminate poor-performing teachers. Those charged with carrying out public policy, end up making it.

Unsurprisingly, these contracts have a deleterious effect on the provision of public education, because decoupling pay and performance impairs school districts' ability to attract and retain the best teachers while leaving them powerless to fire incompetent and underperforming teachers. Action by this Court is necessary to remedy the ills caused by public unions.

ARGUMENT

I. Collective Bargaining By Teachers' Unions Is Largely One-Sided.

A. The Very Nature Of Public Employment Nearly Eliminates The Adversarial Dynamic of Collective Bargaining, Leaving Public Sector Unions Largely Unopposed At The Bargaining Table.

Collective bargaining is the "performance of the mutual obligation" of the employer and the representative of the employees "to meet at reasonable times" and bargain "in good faith" to reach agreement with respect to the "conditions of employment." 29 U.S.C. § 158(d). The point of collective bargaining is to foster "equality of bargaining power between capital and labor." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 507 (1960) (Frankfurter, J., dissenting). It is intended to create a give-and-take environment where each side is expected to make trade-offs. *See id.*; *see also Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980) (acknowledging the "give and take of free collective bargaining").

The collective-bargaining model, however, is ill-suited for the public-employment context. Indeed, President Franklin Delano Roosevelt, a proponent of private unions, warned that "the process of collective bargaining, as usually understood, cannot be transplanted into the public service." Franklin D. Roosevelt, *The President Indorses Resolution of Federation of Federal Employees Against Strikes in Federal Service* (Aug. 16, 1937), *in* 1937 The Public Papers and Addresses of Franklin D. Roosevelt 324, 325 (Samuel I. Rosenman ed., 1941).

This is because of the structural differences between public and private employment. Unlike private-sector unions, public unions typically bargain over services, such as fire, police, and education, "in which the government holds either a monopoly or a near-monopoly." Trevor Burrus, *Harris v. Quinn and the Extraordinary Privilege of Compulsory Unionization*, 70 N.Y.U. Ann. Surv. Am. L. 283, 299 (2015) (citing Lee C. Shaw & R. Theodore Clarke, Jr., *The Practical Differences Between Private & Public Sector Collective Bargaining*, 19 UCLA L. Rev. 867 (1972); Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. Pa. J. Lab. & Emp. L. 441 (2003)). Public unions' monopoly or near-monopoly status affords them much stronger bargaining positions than their private-sector counterparts. *See id.* Consequently, public unions have substantial leverage over budgets and taxes.

This leverage is compounded by the fact that the government officials with whom they bargain lack discipline imposed by competitive market forces and thus "do not have sufficient interest in the outcome to push back against union demands." *Id.* Moreover, the costs of union wages and benefits are not borne by the employer, but by taxpayers who are not at the bargaining table and thus may not recognize the effect on their respective tax burdens. *See* DiSalvo, *supra*, at 164 (explaining that public unions "are mobilized to defend the benefits that have accrued to their members, while comparatively unorganized taxpayers see little benefit from taking on these issues"); *id.* at 28 ("The 'rationally' ignorant public pays little attention to public sector labor relations, while the unions are preoccupied with it."); *see also* Summers, 5 U. Pa. J. Lab. & Emp. L. at 446-47. As President Roosevelt explained, "the whole people" are the "employer" in

the public sector; these "distinct and insurmountable limitations ... make it impossible for administrative officials to represent [them] fully." Roosevelt, *supra*, at 325. As a result, public unions have no genuine adversary on the other side of the bargaining table. *See generally* DiSalvo, *supra*.

As the House Committee on Labor recognized in reporting the National Labor Relations Act favorably to the House, "[c]ollective bargaining is reduced to a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals ...." H.R. Rep. No. 74-1147, at 18 (1935) (statement of William P. Connery, Jr., Chairman of the House Committee on Labor); *cf. Jones & Laughlin Steel Corp.*, 66 N.L.R.B. 386, 401 (1946) (explaining that each side "is entitled to be represented at the bargaining table by persons owing entire allegiance to it"). This is no less true when the employee sits on both sides of the bargaining table. In either scenario, the ideal of collective bargaining—equality of bargaining power, *see Ins. Agents' Int'l Union*, 361 U.S. at 507—could not be further away.

What allows public unions to exploit these dynamics is membership and money, which are underpinned by agency fee provisions. Agency fees are monies that nonunion members in a bargaining unit must pay to the union to cover the costs of collective bargaining. In California (and twenty-four other States that permit so-called "agency shops"), public unions are entitled to collect these fees from public employees who refuse to join the union. Because the unions often set these fees as nearly identical to union dues, they provide a powerful

incentive for many workers to simply join the union. With more members, the union has more dues money to spend on politics. While agency fees cannot legally be used for political advocacy, in the public sector it is often difficult to tell where to draw the line between spending on collective bargaining stops and spending on political advocacy begins. Consequently, unions dues from a larger membership and likely some percentage of agency fees fund union political advocacy and support political campaigns of union-friendly politicians, who (once elected) act as "management" and in less adversarial negotiations allow teachers' unions to obtain salary increases and more favorable terms of employment. The unions then collect more dues, some of "which are funneled back into the same politicians' campaigns war chests," re-starting the same process. DiSalvo, *supra*, at 28-29. "The result is a cycle that is hard to break." *Id.*

B. Teachers' Unions Take Actions To Ensure They Do Not Face An Adversary At The Bargaining Table.

"[P]ublic employees' interest in lighter work load and higher wages conflicts" with the interest of the public (their ultimate employer) "in more service and lower taxes." Clyde W. Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156, 1159 (1974). Accordingly, teachers' unions seek to preserve the non-adversarial dynamic of public-union collective bargaining in order to fulfill their objective "to bring school board policy and decisions into harmony with [their] own views." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 256 (1977) (Powell, J., concurring). Primarily, they do so through

influencing elections. DiSalvo, *supra*, at 28 ("Government unions make campaign contributions and organize get-out-the-vote drives to elect politicians who then act as management in negotiations over pay, benefits, and work rules.").

With more dues-paying members and agency fee monies, teachers' unions actively engage in politics at all levels of government. Indeed, teachers' unions were the top contributors to federal elections from 1989 to 2009—surpassing *all* other special interest groups.[2] They are also the biggest spenders on state campaigns. Terry M. Moe, Special Interest: Teachers Unions and America's Public Schools 288-89 tbl. 9-3 (2011); *see also id.* at 292 (noting that teachers unions alone outspent business groups in 36 of the 50 states); Troy Senik, *The Worst Union in America*, City J., Spring 2012 ("CTA outspent the pharmaceutical industry, the oil industry, and the tobacco industry *combined*."). This campaign spending translates into massive influence over legislation. *See* Matthew Futterman & James M. O'Neill, *Despite Setbacks, Teachers Union Remains a Political Force*, Philly.com (Nov. 14, 1996) (reporting the remarks of former Governor Thomas Kean: "If you ask anyone in politics, from either party, to name the top two or three most influential groups on legislation in Trenton, they'll name the NJEA"); Dan Walters, *Democrats Strengthen Unions Noose*, Orange County Reg., July 10, 2009 ("[P]ublic employee unions wield immense—even

2. Data combining NEA and AFT federal contributions shows over $59 million spent during this time period, nearly $14 million more than the next largest donor. Terry M. Moe, Special Interest: Teachers Unions and America's Public Schools 283 tbl. 9-2 (2011).

hegemonic—influence over the [California legislature's] Democratic majority.").

Their greatest influence is over local elections, in contests for school board seats. Indeed, teachers' unions make the bulk of their campaign contributions in state and local elections.[3]

Such elections are typically marked by low turnout, making them subject to the disproportionate influence of motivated, well-funded, well-organized groups like teachers' unions. *See* Moe, *supra* note 2, at 114-15. Between their unmatched spending in local elections and their comparatively high turnout rates, *id.* at 144-54, teachers' unions are able to install into office "the very people they will be bargaining with." *Id.* at 112; *see id.* at 115 (recounting an instance in which a local affiliate of the American Federation of Teachers successfully replaced an uncooperative school board with a pro-union majority and a new school board president "who was a retired teacher and a former president of the teachers union itself"). Ultimately, then, teachers' unions exercise outsized influence in campaigns.

As evidence of the importance of such efforts to union bargaining, teachers' unions instruct their members "on the planning and implementation of a successful school board election strategy—and the importance of maintaining a relationship with those leaders after they're

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3. From 2002 to 2008, teachers' unions spent just over $23 million on federal elections, and over $109 million on state/local elections (defined as contributions to candidates and parties), with another $148 million on ballot measures. *See* Moe, *supra* note 2, at 281.

elected." *PAC Power! Everything You Need to Know to Create a Politically Active Local Association!*, Michigan Education Association Political Action Committee, Aug. 2015, at 23, *available at* http://www.mea.org/sites/default/files/images/BFCL_Power_Booklet.pdf. Indeed, this is the public-union playbook. This is quite literally the case in places like Michigan, where the Michigan Education Association has published an instructional manual to its members entitled, "Electing Your Own Employer, It's as Easy as 1, 2, 3," as part of its mission of "elect[ing] pro-public education candidates for all elected offices in local and state government up and down the ballot." *Id.* at 3, 23.

In the event that teachers' unions actually encounter an adversary on the other side of the bargaining table, they frequently attempt to stymie negotiations they fear will not prove fruitful. Public-union arrangements commonly feature a provision that keeps in place the terms and conditions of any collective-bargaining agreement after the agreement has expired and until a new agreement has been reached, *see Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. NLRB*, 501 U.S. 190, 203 (1991). *See, e.g.*, N.Y. Civ. Serv. Law § 209-a(1)(e); *see also* DiSalvo, *supra*, at 224. Public-union employees can use these provisions to wait out the current administration until a more favorable one enters office.

To illustrate, New York City Mayor Michael Bloomberg had campaigned on, among other things, education reform. During his third term, when he proposed a new collective-bargaining agreement that the union opposed, the teachers' unions simply allowed their contract to expire in order to avoid negotiating with him. At the same time, they supported the campaign of Bill de Blasio. DiSalvo, *supra*,

at 224. Once Mayor Bloomberg was replaced with Mayor de Blasio, the teachers' unions negotiated retroactive raises worth $3.6 billion in exchange for unspecified future savings. *Id.*

Elected officials, especially school board members, turn over much more rapidly than management in the private sector, making this a viable technique for public unions choosing to delay collective bargaining until the next candidate comes along. And the unions do not have to wait until their favored candidate actually enters office to gain some advantage. As the campaign season for the next election begins, public unions back the opposition candidate and bring their issues to the forefront of the political debate, thereby pressuring the incumbent to act in their interest.

II. Teachers' Unions Secure Pay And Benefits Disconnected From Performance And Rules That Insulate Them From Termination And Any Meaningful Substantive Evaluation.

"The bargaining agent representing teachers exists solely to articulate and try to achieve the goals ... in the self interest of its members." Moe, *supra* note 2, at 177 (quoting Robert L. Walker, The Teacher and Collective Bargaining 29 (1975)). With no genuine adversary on the other side of the table, teachers' unions regularly bargain for teachers to be "paid on a rigid salary scale that evinces little regard for individual competence," even though "teachers themselves believe it is possible to identify those deserving of rewards." Frederick M. Hess & Coby Loup, *The Leadership Limbo: Teacher Labor Agreements in America's Fifty Largest School Districts*

14 (Thomas B. Fordham Institute 2008). Teachers' unions also bargain for rules that prevent school districts from terminating poor-performing teachers, even though many "[t]eachers agree that tenure laws protect educators who should not be in the schools." *Id.* at 15. And teachers' unions promote policies that insulate teachers from any meaningful performance evaluation by inhibiting district administrators from "differentiating between successful and unsuccessful teachers and from providing them with feedback to help them improve their practice." Katharine Strunk & Jason Grissom, *Do Strong Unions Shape District Policies?*, 32 Educational Evaluation and Policy Analysis 389, 396 (2010).

A. Teachers' Unions Bargain For Terms That Decouple Salary And Performance.

Teachers' unions typically negotiate what are known as salary schedules. Salary schedules are set pay scales that determine compensation *solely* according to a teacher's years of service and the extent of his or her education and training (educational degrees and professional development credits). *See* Moe, *supra* note 2, at 179; DiSalvo, *supra*, at 199 ("Only two things impact most teachers' salaries: length of service and additional education obtained."). That is, a teacher's compensation is determined by formula without considering a single fact about actual on-the-job performance, including work ethic, parent satisfaction, classroom engagement, student improvement, or any other classroom-based factor. Simply put, "[p]roductivity has nothing to do with [compensation]." Moe, *supra* note 2, at 173. According to the National Center for Education Statistics, during the 2011-12 school year, 89.2% of all public school districts paid teachers based on

a salary schedule, including 100% of teachers in eleven states, and over 95% in another nine states (including California at 96.4%). *See Schools and Staffing Survey*, compiled by the Institute of Education Sciences, U.S. Department of Education (2012), *available at* https://nces.ed.gov/surveys/sass/tables/sass1112_2013311_d1s_002.asp.

Merit and results do not matter—to make more money, one must simply stay in the system. Moe, *supra* note 2, at 179 (noting that, in these systems, most teachers' "[s]alary schedules are a grid with 'steps' representing seniority and 'lanes' indicating degrees earned and additional educational credits"). Teachers' unions have collectively bargained for this type of culture, where "[a] contract rule specifies where teachers start and how they advance on that grid to determine their salary." DiSalvo, *supra*, at 199. In theory, such pay scales are premised on the idea that all teachers are of equal ability and diligence and continually improve in performance year over year. In reality, however, teachers' unions create schools where "[n]o amount of extra effort or outstanding classroom performance on the part of an individual teacher can change his or her salary." *Id.*

B. Teachers' Unions Make Termination Of Poor-Performing Teachers Nearly Impossible.

When a school district's budget has been exhausted, and even the non-adversarial representative across the table can give no further on pay, the school district will often concede limitations on its discretion to terminate poor-performing teachers. These limitations are, in theory, free to give. In effect, the district pays teachers

in the currency of job security. Moe, *supra* note 2, at 175-76. That is, up front they do not cost the district money and do not commit the district to spending money. But should the time come when a district wishes to remove a teacher, these concessions will impose enormous costs, as the collective-bargaining agreement will contain so many procedural regulations that a drawn-out legal battle is virtually guaranteed to ensue.

Moreover, these procedural regulations create numerous escape hatches for poor-performing teachers to avoid termination on a technicality, even if termination is warranted on the merits. *See* Scott Reeder, *School Boards Lose Power to Fire Poor Teachers*, The Hidden Costs of Tenure (2005) ("When you try to fire a bad teacher, it's all about procedure. Rarely will the union lawyer argue that a particular teacher facing dismissal was good at his or her job. They will argue that not all the procedures were followed correctly."). Indeed, attorneys who represent teachers' unions have readily acknowledged that poor-performing teachers are often kept on the job solely because of procedural red tape that inhibits termination: "If I'm representing them, it's impossible to get them out. It's impossible. Unless they commit a lewd act. Not that I want them on the job, as a private citizen, but as an advocate ... I will save the job." Steve Farkas, et. al., *Rolling Up Their Sleeves: Superintendents and Principals Talk about What's Needed to Fix Public Schools*, Public Agenda 21 (2003).

The result is that principals have largely given up on trying to remove bad teachers—thus leaving them in the classroom, continuing to damage the minds of tomorrow. As one principal responded in the Public Agenda survey:

> We don't get rid of those people [who] shouldn't be in our profession anymore, because ... now the issue change[s] from addressing a teacher who should have been out of the classroom years ago to how I dealt with that teacher through that process, making sure I dotted every 'i,' making sure I crossed every 't.' Any mistake I made [procedurally], that's where the focus of the conversation shifted to.

Farkas, *supra*, at 32; *see also* DiSalvo, *supra*, at 201 ("[I]f [school districts] don't follow every procedural stipulation to the letter, the union-appointed lawyer defending the teacher will win on technicalities.").

On top of the practical difficulties with terminating poor-performing teachers, these procedural hurdles drive up the cost of defending termination decisions. For example, "[i]t cost the Los Angeles school district $3.5 million in legal fees and nearly a decade trying to dismiss seven teachers—four were ultimately dismissed but two of them received large payouts." *Id.* And, "[i]n Illinois, it costs an average of $219,000 to dismiss one teacher." *Id.* at 201.

In the nation's largest school district, New York City, things are no different. In the 2006-07 school year, after Mayor Bloomberg spearheaded one of the largest battles in education reform to date, only eight teachers out of 55,000 were removed for poor performance—about one-one hundredth of one percent (0.01%). One can only imagine just how bad these eight teachers were that the school decided to undertake the arduous task of actually firing them. But that did not stop the union from drawing

out the process with 25 days of hearings, 150 hours of the principal's time, and at a cost of over $225,000 to the school district—*per case*. Moe, *supra* note 2, at 187.

Statistics support the same conclusion. In an 18-year review of Illinois' 876 school districts, one study found that the state averaged terminating only two of its 95,000 tenured teachers per year for poor performance (approximately two thousandths of one percent). Scott Reeder, *Tenure Frustrates Drive for Teacher Accountability*, The Hidden Costs of Tenure (2005). Likewise, in California, "0.002 percent (which is to say effectively zero) of teachers are dismissed for performance-based reasons in a given year, compared to ... 8 percent of private sector workers." DiSalvo, *supra*, at 201.[4]

C. Teachers' Unions Insulate Their Members From Any Meaningful Performance Review.

Even beyond protecting teachers from termination, teachers' unions negotiate for policies that shield their members from any meaningful performance evaluation or oversight by their supervisors. They often contract for a binary review scale (satisfactory/unsatisfactory). The same procedural rules that prevent school districts from terminating poor-performing teachers weigh against negative reviews. Naturally, then, teachers are almost uniformly rated as satisfactory. For example, through 2013, over 95 percent of New York City teachers were

4. In other words, California teachers' union members are approximately 4,000 times less likely to be terminated for performance-based reasons private-sector workers.

rated as satisfactory. *See* DiSalvo, *supra*, at 200-01. Even more striking, in Illinois, only 513 out of 477,000 teacher evaluations over an 18-year period resulted in an unsatisfactory review. Moreover, 83% of those 876 Illinois school districts never gave a single tenured teacher an unsatisfactory rating. *See* Moe, *supra* note 2, at 186; *see also* Daniel Weisberg, et. al., *The Widget Effect* 6 (2009) (finding that when the options are satisfactory and unsatisfactory, 99% of teachers receive a satisfactory rating).

These figures are all the more striking when compared with the results of a 2003 study that revealed that 78% of the teachers surveyed believed that teachers employed within their schools "fail to do a good job and are simply going through the motions." Farkas, et. al., *Stand by Me*, Public Agenda, 20, 44 (2003); *see also* Hess, *supra*, at 15 (finding that teachers recognize that contract rules inhibit administrators from removing ineffective teachers who should not be in the schools).[5]

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5. With no meaningful review of their performance, teachers have no incentive to improve their performance. Conservative estimates indicate that over 2.5 million American children are in classrooms where the teacher is incapable of teaching the subject. *See* Moe, *supra* note 2, at 184-85 (noting that, in 2004, half of the middle school teachers in Philadelphia failed a basic competency test for the subject they were teaching).

III. Teachers' Union Bargaining Impairs The Provision Of Services In Public Schools And Across State And Local Governments More Generally.

Despite their self-interested bargaining and the removal of any incentive to boost student performance, teachers' unions maintain that there is a "happy compatibility between their own interests and what is best for kids and schools." Moe, *supra* note 2, at 79. This is demonstrably incorrect. Disconnected from performance, salary schedules and seniority protections do not produce better outcomes in terms of educating students. Indeed, studies show the opposite. Moreover, these types of provisions impede the ability of state and local governments to provide other government services.

A. Teachers Unions' Bargaining Undermines Objectives And Outcomes In Public Education.

By decoupling pay and performance, teachers' unions ensure that salary increases do not inure to the benefit of students. The *Washington Post* compared two similar counties in the Washington, DC suburbs in a case study that illustrates the point. *See* Editorial, *A Tale of Two Counties*, Washington Post, (May 30, 2010), at A16. The 2010 study examined public schools in Montgomery County, Maryland and Fairfax County, Virginia, both wealthy counties of comparable size. *Id.* In Maryland, collective bargaining with public employees is legal, while in Virginia it is not. *Id.* Public unions in Maryland succeeded in obtaining very high average salaries for teachers in Montgomery County ($76,483), the highest in the region and nearly 20 percent higher than the average

for Fairfax County teachers. *Id.*[6] But higher spending did not translate into higher achievement for students. As the *Post* explained: "The spending gap is not about classroom quality and student achievement; in those terms the two school systems are comparable. Rather, the difference is compensation, which accounts for 90 percent of Montgomery's education spending." *Id.*[7]

Indeed, studies have shown that pay increases unattached to performance and senior protections actually *impair* the provision of public education. In particular, a 1996 study published in the Quarterly Journal of Economics analyzed data obtained from unionized and non-unionized schools over a period of approximately 30 years and concluded that "teachers' unions are primarily rent seeking, raising school budgets and school inputs but lowering student achievement by decreasing the productivity of [those] inputs." *See* Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, 111 Q.J. Econ. 671, 671-73, 711 (1996).

This should not be surprising. As noted above, teachers' unions negotiate terms that protect all teachers and prevent poor-performing teachers from being terminated. Moreover, the decoupling of pay and performance misaligns teacher incentives. In particular, it disincentivizes under-performing teachers from working

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6. From 2000 to 2010, Montgomery County teachers' salaries skyrocketed, nearly doubling, and increasing at approximately triple the inflation rate. *A Tale of Two Counties*, *supra*.

7. Perhaps the most direct effect of Montgomery County's ballooning teacher salaries was the County's "$1 billion deficit." DiSalvo, *supra*, at 32.

to improve performance. *See supra* 13 & 17 n.5. At the same time, this practice hampers school districts' ability to recruit and retain high-aptitude teachers (because their superior performance will go unrewarded). *See, e.g.*, Caroline M. Hoxby & Andrew Leigh, *Pulled Away or Pushed Out? Explaining the Decline of Teacher Aptitude in the United States*, 94 Am. Econ. Rev. 236, 239-40 (May 2004). Seniority protections exacerbate this problem for the most talented junior teachers. Moe, *supra* note 2, at 313-14; *cf. Vergara v. California*, No. BC 484642, slip op. at 13 (Cal. Super. Ct. Aug. 27, 2014) ("No matter how gifted the junior teacher, and no matter how grossly ineffective the senior teacher, the junior gifted one, who all parties agree is creating a positive atmosphere for his/her students, is separated from them and a senior grossly ineffective one, who all parties agree is harming the students entrusted to her/him, is left in place. The result is ... a lose-lose situation.").

Worse still, social-science evidence indicates that the negative effects of union rent-seeking behavior impacts low-income minority students the most. *See* Terry M. Moe, *Collective Bargaining and the Performance of the Public Schools*, 53 Am. J. Pol. Sci. 156, 157, 172-73 (2009). Union seniority rules are a major reason for this. *See id.* at 192 ("[T]he stronger the seniority rights in a district, the more its disadvantaged schools will tend to be burdened with disproportionate numbers of highly inexperienced teachers."); Jessica Levin, et. al., *Unintended Consequences: The Case for Reforming Staffing Rules in Urban Teachers Union Contracts*, The New Teacher Project 4 (2005) (finding that "urban schools must often staff their classrooms with little or no attention to quality or fit because of the staffing rules

in their teachers union contracts"); Myron Lieberman, *The Educational Morass: Overcoming the Stalemate in American Education* at 133-34 (2007) ("No student impact is as clear-cut as the negative impact of union seniority on inner-city schools.").

B. Teachers Compensation Results In The "Crowding Out" Of Other Government Services.

Through its policy agenda, teachers' unions have managed both to increase the cost of government *and* make it less effective. Money is increasingly being spent on government employee compensation, rather than services. In fact, in 2013, the total cost of wages and benefits for state and local workers was $1.2 trillion—*half* of the $2.4 trillion in total spending by state and local governments.[8] The problem is even more acute in local governments, with 70 to 80 percent of the budget "[i]n the typical city, town, or school district" set aside for public employee compensation. *See* Steven Malanga, *The Compensation Monster Devouring Cities*, City Journal (Summer 2011), *available at* http://www.city-journal.org/2011/21_3_public-workers.html.

Scarce tax dollars and limitless government priorities result in a fundamental tension: "If government spends more on the salaries, pensions, and healthcare of its employees, it cannot spend more on things like public

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8. *See* U.S. Bureau of Econ. Analysis, National Income and Product Accounts, Tables 3.3 ("State and Local Government Current Receipts and Expenditures") & 6.2D ("Compensation of Employees by Industry").

transit, school buildings, park maintenance, and relief to the poor—unless it raises taxes, uses budget gimmicks, or takes on greater debt." DiSalvo, *supra*, at 162. However, teachers' unions are not in the business of worrying about the provision of quality government services (in any arena); their job is to get their constituents higher salaries, more generous pensions, and better benefits. Public-sector unions have capitalized on "a persistent structural problem with public policies where the benefits are highly concentrated and the costs on society widely dispersed." *Id.* at 164. This is certainly evident in the case of teachers' unions, which "are mobilized to defend the benefits that have accrued to their members, while comparatively unorganized taxpayers see little benefit from taking on these issues." *See id.*

Further, collective bargaining agreements in the public sector limit legislators' options in finding innovative solutions to this problem. "The choices available to policymakers today are powerfully constrained by laws and collectively bargained contracts that passed years ago." *Id.* at 163. The budgets are increasing but less governing is taking place, "as huge portions of budgets are fixed costs." *Id.* "Consequently, policymakers cannot set new goals when older, entrenched programs siphon off all the money. Crowding out thus affects government purpose and the capacity for self-government." *Id.*

In addition to (and in part because of) raising salaries and seniority rules, public-sector collective bargaining and unionization have also led to increased pension obligations to these employees, at rates that are unsustainable. *Id.* at

154-59, 161.[9] In the case of teacher pensions, specifically, "[a]nalysts estimate the total unfunded liability of U.S. teacher pensions to be somewhere between $390 billion, on the low end, and nearly $1 trillion dollars, on the high end, which is almost double the total annual budget of all American public education." *Id.* at 172. This squeeze on state and municipal budgets affects everything that government does. As the former mayor of Los Angeles has explained: "All that makes urban life rewarding and uplifting is under increasing pressure, in large part because of unaffordable public employee pension and health care costs." Richard J. Riordan & Tim Rutten, *A Plan to Avert the Pension Crisis*, N.Y. Times, Aug. 4, 2013, at A17. Ultimately, the public suffers, as it is stuck with inferior services, higher taxes, or often—both.

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9. Because pensions are often linked to most recent salary levels, rising salaries and seniority rules often result in rising pension obligations. *See* John O. McGinnis & Max Schanzenbach, *The Case Against Public Sector Unions*, Hoover Institution Policy Review, (Aug. & Sept. 2010) (explaining that public employees "are often paid a pension based on their previous year's wages or an average of their previous three years' wages, including overtime"); Robert Novy-Marx & Joshua Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 The Journal of Finance 1211, 1216, 1219 (2011); DiSalvo, *supra*, at 161 ("[T]o the extent that unionization has contributed to increased salaries from which pensions are calculated, ... it has contributed to the biggest challenge confronting state and local public finances today.").

CONCLUSION

Amicus curiae respectfully requests that the Court reverse the judgment below.

Respectfully submitted,

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